

This is a section of a larger brief in a CDP Lien Action. It was filed with the court in mid January of 2016. As of this writing on July 9, 2016, the court has not rendered a decision. There is no deadline for decisions in the tax court. The Court may take as long as it likes to decide a case.

When the Court faces issues such as this one that address long-running prejudice in favor of the IRS, we can expect to wait longer for them to figure out how they are going to either misrepresent what the petitioner argued, or to skew the law in order to justify continued lawlessness.

I will be happy to provide the entire brief, with R's Reply and the Petitioner's Closing Brief on request. It covers a number of other issues that may be of interest to those in a CDP case. In Respondent's Reply Brief his attorney replied to this entire section with a single line of mumbo jumbo about there being "no such rigorous standard" in this court. By failing to argue in response, R has conceded the correctness of the arguments in this brief.

**C. RESPONDENT'S HEARING OFFICERS FAILED TO COMPLY WITH § 6330(c)(1) BY FAILING TO OBTAINING VERIFICATION FROM THE SECRETARY THAT ALL LAWS AND PROCEDURES WERE FOLLOWED IN MAKING THE ASSESSMENTS AND TAKING THE COLLECTION ACTIONS AT ISSUE.**

62. This is an issue of statutory construction that has been at least peripherally raised and disposed of without much discussion by this court in many cases in the past. The T.C.

Opinion cases that are most often cited in memorandum decisions are Nestor<sup>4</sup>, Roberts<sup>5</sup>, and Lundsford<sup>6</sup>.

 63. Petitioner is unaware of the arguments made by petitioners in those cases other than what the court summarized or noted in Tax Court opinions. Petitioner does not have the means to search Tax Court pleadings and therefore doesn't know whether previous petitioners have briefed statutory construction arguments concerning § 6330(c)(1). For the purposes of this brief, and as far as Petitioner is aware, having read the chief cases on the verification issue, he is raising it as an **issue of first impression.**

64. When IRS compliance with the verification requirements of § 6330(c)(1) has been challenged by petitioners in the past, this court has found that certified forms 4340, CERTIFICATE OF ASSESSMENTS, PAYMENTS, AND OTHER SPECIFIED MATTERS, meet the requirements of verification as stated in the statute. (See Nestor, Roberts, and Lundsford, cited *supra*, and a host of memorandum opinions citing them.)

65. Petitioner has reviewed the chief Tax Court Opinions on the matter, but has found that their discussions focus generally

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<sup>4</sup> Nestor v. CIR, 118 T.C. 162 (2002)

<sup>5</sup> Roberts v. CIR, 118 T.C. 365, 371 n.10 (2002), affd. 329 F.3d 1224 (11th Cir. 2003)

<sup>6</sup> Lunsford v. CIR, 117 T.C. 183 (2001)

on the petitioners' having protested that they were not presented with some specific document or another, mainly Form 23C assessment certificates, but others as well, to fulfil the verification requirements of § 6330(c)(1).

66. The courts have consistently found that no particular document is required to meet R's statutory obligation.

(Roberts, *supra*)

67. Petitioner in this case is not seeking any particular document. Based on his understanding of the meaning of the word "verification" when used in statutes, Petitioner is seeking a properly "verified" statement from the Secretary or his delegate that expressly states that "the requirements of all statutes, regulations and laws" have been complied with in creating the tax debts referenced in the NFTLs in this case. There is no such document in the record of this case.

68. Petitioner has not found a discussion of the statutory construction of the word "verification" in § 6330(c)(1) in any of the cases relating to the issue.

69. Petitioner has not found a discussion in this court's decisions of the interpretation of the language of §6330(c)(1) based on the canons relating to 'surplusage' and 'strict construction of tax law.'

70. It is this Petitioner's contention that this court and others are ignoring the legal meaning of the word "verification,"

and are thereby allowing R to enjoy a presumption of propriety based on **inadmissible evidence**. Few petitioners are aware of the court created presumption they must overcome until it is too late.

71. Petitioner in this case does not seek any particular form or document to meet R's requirement of verification. Petitioner is instead demanding a lawful "verification" that expressly, and not by implication, complies with the statute's requirement: "**The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.**"

(§6330(c)(1)D

72. The issue is solidly and solely based on the interpretation of the word 'verification' in that statute and an application of the statute that uses all the words in it.

**a. STRICT STATUTORY CONSTRUCTION OF TAXING STATUTES  
GENERALLY**

73. It is long settled that the words of tax statutes must be strictly interpreted and ambiguity resolved in favor of the tax payer. Justice Southerland expressed it well in U.S. v. Merriam:

"But in statutes levying taxes the literal meaning of the words employed is most important for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the

doubt must be resolved against the government and in favor of the taxpayer." (U.S. v. Merriam, 263 U.S. 179, 184 (1923); See also Gould v. Gould, 245 U.S. 151, 153, 38 S.Ct. 53 (1917); Eidman v. Martinez, 184 U.S. 578, 583, 22 S.Ct. 515, (1902))

74. There is no ambiguity in the words of this statute. Instead, the statutory meaning of one particular word is being ignored in order to create an unjustified presumption in favor of the government concerning its duty to provide a comprehensive "verification."

75. At the same time, other words in the statute are being ignored and treated as "mere surplusage" to lend Appeals Officers an authority they do not possess, specifically, to "verify" anything on behalf of the Secretary of the Treasury. I will discuss the meaning of the word "verification" first.

#### **b. THE STATUTORY MEANING OF THE WORD VERIFICATION**

76. The word "verification" when used in a statute means: "Confirmation of correctness, truth or authenticity, by affidavit, oath or deposition." (Black's Law Dictionary, West Publishing, St. Paul, Minn., 6th ed., 1990, pg. 1561)

77. It is also a settled canon of legal interpretation that where the same word is used in a body of law, its meaning is the same wherever it appears. "A term appearing in several places in a statutory text is generally read the same way each time

it appears." (Ratzlaf v. United States, 510 U.S. 135, 143 (1994); See also Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995); and Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co., 505 U.S. 214, 225 (1992))

78. The word "verify" and its grammatical variations appear throughout Title 26 and other federal and state law reflecting the long settled statutory meaning of the word. Congress has clearly said what it intends "verification" to mean in the I.R.C. where it defines "Verification of returns" at 26 U.S.C. § 6065:

**"Verification of returns**

Except as otherwise provided by the Secretary, any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury." (emphasis added) (26 U.S.C. § 6065 as copied from the website of the Office of Law Revision Counsel,

<http://uscode.house.gov/view.xhtml?req=%28title:26%20section:6065%20edition:prelim%29%20OR%20%28granuleid:US-C-prelim-title26-section6065%29&f=treesort&edition=prelim&num=0&jumpTo=true> **Title emphasized in bold type in original)**

79. In Title 26 Congress has clearly stated that "verification" means what Black's Law Dictionary says it means, a declaration sworn or formally affirmed to be true.

80. In dealing expressly with statutory declarations, Congress once again shows that it considers the following terms to be

synonymous "...sworn declaration, verification, certificate, statement, oath, or affidavit." See 28 U.S.C. § 1746:

"Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the **sworn declaration, verification, certificate, statement, oath, or affidavit**, in writing of the person making the same ... such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:" [Instructions follow] (all **boldface emphasis** here and elsewhere below was added by petitioner unless otherwise stated)

(28 U.S.C. § 1746, Unsworn declarations under penalty of perjury, copied from the website of the Office of Law Revision Counsel, [www.uscode.house.gov](http://uscode.house.gov/view.xhtml?req=%28title:28%20section:1746%20edition:prelim%29%20OR%20%28granteuid:USC-prelim-title28-section1746%29&f=treesort&edition=prelim&num=0&jumpTo=true). Specifically at: <http://uscode.house.gov/view.xhtml?req=%28title:28%20section:1746%20edition:prelim%29%20OR%20%28granteuid:USC-prelim-title28-section1746%29&f=treesort&edition=prelim&num=0&jumpTo=true> )

81. The word "verified" is used in this conventional legal sense even in this court's own Rules 26 and 33. Rule 26 states that "The Court will accept for filing papers submitted, signed, or **verified** by electronic means... ." (Tax Court Rules of Practice and Procedure, Rule 26(a), downloaded from ustaxcourt.gov : <http://ustaxcourt.gov/rules>Title III.pdf>)

82. Tax Court Rule 33(a) informs us that unless directed by the court, "... pleadings need not be **verified or accompanied by affidavit or declaration.**" (Tax Court Rules of Practice and Procedure, Rule 33(a), downloaded from [83. This court understands the meaning of the word "verification," and it is no different in this forum than in any other. To be valid, a "verification" must be provided under oath or affirmation of its truth.](http://ustaxcourt.gov/rules>Title IV.pdf</a> )</p></div><div data-bbox=)

84. The Federal Rules of Civil Procedure, (FRCP) to which the Court under its own Rule 1(b) must give "particular weight," repeatedly uses the word "verify" the same way it is used in the statutes and the Tax Court Rules, to indicate the act of confirming truth by oath or similar secular declaration. See e.g.:

- a. FRCP Rule 5.1(d) (3), "Electronic Filing, Signing, or **Verification**";
- b. FRCP Rule 11(a) "Unless a rule or statute specifically states otherwise, a pleading need not be **verified** or accompanied by an affidavit.;"
- c. FRCP Rule 23.1(b) "PLEADING REQUIREMENTS. The complaint must be **verified** and must:...";
- d. FRCP Rule 27(a) (1), "*Petition.* A person who wants to perpetuate testimony about any matter cognizable in a

United States court may file a **verified** petition in the district court for the district where any expected adverse party resides."

85. Throughout the FRCP the words verify and verified are consistently used to refer to properly sworn declarations, and in particular, "verified complaints" are repeatedly referenced to indicate that the facts in any complaint, to be procedurally sufficient, must be sworn to be true. See FRCP:

- a. Rule 65(b)(1)(A) "verified complaint,";
- b. Supplement Rule B(1)(a) "verified complaint,";
- c. Supplement Rule C(2)(a) "the complaint must... be verified,";
- d. Supplement Rule C(6)(i) "verified statement of right,";
- e. Supplement Rule G(2)(a) "The complaint must:... be verified;." (All selections from the FRCP are downloaded from the United States Court's website, <http://www.uscourts.gov/file/rules-civil-procedure> )

86. There is no disagreement in American courts and administrative agencies concerning the meaning of the word "verify" and its derivatives. In order for a statement or document to be considered a valid "verification" it must be made under oath or other assurance of truth.

87. State courts agree as well. The court in Commonwealth v. Jones, 487 Pa. Superior Ct. 490, 491 (1977), citing and quoting Black's Law Dictionary for the same definition Petitioner has provided supra, stated: "It is generally recognized, however, that **for legal purposes verification means confirmation of the truth of a statement by oath or affirmation.**";

88. In Crain v. State, 914 So. 2d 1015, 1018, Fla. 5th Appeals District (2005), the court said, concerning "verifications" required by law, regulation, or agency rule, "**Verification means that the individual executes the required document with an oath or affirmation that the information contained therein is true**—it does not require that the document be sworn to before an individual authorized to administer oaths."

89. In Aetna Glass Corp. v. Mercury Builders, Inc., 145 Ind. App. 286 (1969) 250 N.E.2d 598, the Indiana Appeals court cited the Indiana Supreme Court's lengthy discussion of "verification" in Bader v. State, (1911) 176 Ind. 268, 274, 94 N.E. 1009 as follows:

"A verification is defined ... as 'the certificate that the writing is true.' 2 Bouvier's Law Dict. (15th Ed.) 781.

"Black's Law Dict. (2nd ed.) 205 says: ... Verification is defined as a 'confirmation of the correctness, truth, or authenticity of a pleading, account or other paper, by an affidavit, oath, or deposition,' Black's Law Dict. (2d ed.) 1203.

"In 8 Words and Phrases, 7296 it is said: 'The term "verified," as applied to pleadings and statements of claims filed with municipal officers, has a settled meaning, and refers to an affidavit attached to such a statement of claim, as to the truth of the matters therein set forth.'

"In the case of Patterson v. City of Brooklyn (1896), 6 App. Div. 127, 128, 40 N.Y. Supp. 581, the action related to a claim filed with the controller of the city of Brooklyn, which claim, under the law, was required to be verified. The court said: 'The term "verified" as applied to pleadings and statements of this character, has a settled meaning in our statutory law, and it refers to an affidavit attached to the statement as to the truth of the matters therein set forth.'

"In the case of State v. Trook (1909), 172 Ind. 558, 560, the word 'verify' is defined as follows: 'The primary definition of the verb "verify," when used in matter of law, as given in the Standard Dictionary is: "To affirm under oath; confirm by formal oath; as, to verify pleadings in an action; to verify accounts, etc."'

90. This court's rulings in the chief precedential T.C. Opinions on the §6330(c)(1) compliance issue and in all derived Memorandum Opinions do not address the meaning of the word "verification." The court's opinions have consistently avoided any discussion of the meaning of this key word in the statute. (See Nestor, Lundsford, and Roberts, *supra* and their many derivative Memo opinions, e.g. Banis v CIR, T.C. Memo 2004-237 at 11; Burke v CIR, 124 T.C. No. 11, at pg. 10; Clark v. CIR T.C. Memo. 2012-182, n. 4; and many others)

91. There is no document in the record that could be construed without presumption to be a "verification" of any kind, and certainly none that expressly verifies that "the requirements of any applicable law or administrative procedure have been met" as the statute requires. The forms 4340 submitted by R for the purpose are not sworn and do not claim to be true and correct, except as an accurate reflection of R's **unreliable records**. (Exs. 15-R and 16-R, and the entire record)

92. Instead, with no verified documents at all from respondent, this court has granted him a presumption of having met the criteria of the statute, not with a proper "verification from the Secretary" but by using a document that is merely "certified" to be an accurate reflection of R's **astonishingly inaccurate and unreliable records**. (Exs 15-J and 16-J, R's Answer, ¶¶ 16 and 19, and Exhibits P-12 and P-13)

93. The proffered Form 4340 certifications are not properly verified under penalty of perjury, and do not by any stretch of the language of the certification printed on them meet the requirements of the statute. (Exhibits 15-R and 16-R, and ¶ 43 supra)

94. There is no properly executed "verification" in the record of this case that states unequivocally and without the necessity of broad presumption that "the requirements of all laws and administrative procedures have been met." For this reason

alone R has failed to comply with the provisions of §6330(c)(1). Instead of insisting on the verification specified in the statute, this court and others have carved out a presumption for R's Forms 4340 that most petitioners are not aware of, and that violates a second canon of construction in that it makes much of the language of §6330(c)(1) mere "surplusage," which Petitioner will discuss in the next section.

**c. R'S FAILURE TO 'OBTAIN VERIFICATION FROM THE SECRETARY' GRANTS AUTHORITY TO R'S APPEALS OFFICERS THAT THEY DO NOT POSSESS, AND RENDERS MUCH OF THE LANGUAGE OF THE STATUTE "MERE SURPLUSAGE," WHILE CONTINUING TO IGNORE THE REQUIREMENT OF STRICT INTERPRETATION OF STATUTORY LANGUAGE.**

95. It is long settled in interpreting statutes that the courts should "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language employed." (Montclair v. Ramsdell, 107 U.S. 147, 152 (1883))

96. In modern practice, that canon is reflected in a slight variant stating that statutes are construed "so as to avoid rendering superfluous" any statutory language. (Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991); Sprietsma v. Mercury Marine, 537 U.S. 51, 63 (2003))

(interpreting word "law" broadly could render word "regulation" superfluous in preemption clause applicable to a state "law or regulation"). See also Bailey v. United States, 516 U.S. 137, 146 (1995) ("we assume that Congress used two terms because it intended each term to have a particular, non-superfluous meaning") (rejecting interpretation that would have made "uses" and "carries" redundant in statute penalizing using or carrying a firearm in commission of offense).

97. 26 U.S.C. §6330(c)(1) reads as follows: "The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met." (26 U.S.C. 6330(c)(1), from the website of the Office of Law Revision Counsel, uscode.house.gov, specifically:

<http://uscode.house.gov/view.xhtml?req=%28title:26%20section:6330%20edition:prelim%29%20OR%20%28granuleid:USC-prelim-title26-section6330%29&f=treesort&edition=prelim&num=0&jumpTo=true> )

98. This language does not authorize the IRS appeals officer to personally verify anything. It requires him to "obtain verification." And that verification must be obtained from "the Secretary."

99. Of course, Petitioner is not saying that the Secretary of the Treasury must personally sign the verification. The term "the Secretary" is defined at §7701(a)(11)(B) to mean "the Secretary or his delegate." While "or his delegate" is defined at §7701(a)(12)(A) as "when used in reference to the Secretary of the Treasury, means any officer, employee or agency of the Treasury department duly authorized by the Secretary of the Treasury, directly or indirectly by one or more delegations of authority to perform the function mentioned or described in the context."

100. In Exhibit 1-J, Attachment to the Notice, an unidentified IRS employee alleges in an unsworn statement as follows: "Appeals has obtained verification from the IRS office collecting the tax that the requirements of any applicable law, regulation or administrative procedure with respect to the NFTL filing have been met." (Ex. J-1, pg. 5)

101. While this statement is not admissible under FRE Rules 602 and 805, if it is allowed into evidence the statement is an admission that verification was not sought from the Secretary as required. Additionally, the verification that was allegedly obtained was not obtained "at the hearing," and the "verification" that was sought was obtained by means of forbidden ex parte communication with another IRS branch.

102. This statement appears to be an attempt to comply with Treasury Regulation 301.6330-1T(e). That regulation provides that "Prior to the issuance of a determination, the hearing officer is required to obtain verification from the IRS office collecting the tax that the requirements of any applicable law have been met." (26 CFR 301.6330-1T(e)) The language of this regulation is clearly not in harmony with the language of the statute that requires a "verification from the Secretary," to be obtained "at the hearing." Regulations that exceed or significantly vary from their statutory grant are void and without effect. (Loving v. IRS, 742 F.3d 1013, D.C. Cir. (2014); Ridgely v. Lew, U.S.D.C. District of Columbia, civil Action No. 1:12-cv-00565 (CRC) (2014))

103. The regulation also appears to violate § 1001(a)(4) of RRA98. Congress was understandably concerned with allegations that Appeals merely rubberstamped collections and exams determinations or talked to other agents and didn't report everything they found out. As enacted, the RRA 1998 section forbids ex parte communications "to the extent such communications appear to compromise the independence" of Appeals. (P.L. 105-206, 11 STAT. 69, § 1001(a)(1))

104. Adherence to this regulation, which Appeals appears to attempt in their Notice, requires the appeals officer to

violate RRA 1998 § 1001(a)(4) against "ex parte" communication between Appeals and other IRS departments and especially with the collections function. The regulation expressly requires, and the anonymous appeals officer in the subject Notice admits having ex parte communication with collections. He or she in fact claims that "Appeals," whoever that is, "obtained verification" from Collections. This claim is an admission that the language of the statute was not followed and that RRA98 §1001(a)(4) was violated. It is not possible that communication with other IRS departments that is forbidden by statute should serve as the "verification" required by §6330(c)(1).

105. Petitioner asked **repeatedly** at the CDP hearing and in informal discovery in this proceeding for the statutory "verification" to which he believes he is entitled under the statute. (Ex. 4, Hearing Transcript, pg. 9 ln. 15-22; pg. 10, ln. 9-13; pg. 13, ln. 15-18; pg. 14, ln. 7-12) but the "verification" that R alleges to have obtained from collections has **never** been shown to Petitioner. (entire record) Although this court has decided that the appeals office need not present the statutory verification to anyone at the hearing where Appeals is required to obtain it, there is no excuse or logical reason for R to be excused from providing it in this proceeding.

106. His failure to do so, under long settled policy of this court, creates a presumption in favor of Petitioner that either no such document exists or that if it were produced it would harm R's case. "The rule is well-established that the failure of a party to introduce evidence within his possession and which, if true, would be favorable to his case, gives rise to the presumption that if produced it would be unfavorable." Wichita Terminal Elevator Co. v. Commissioner, 6 T.C. 1158, 1165 (1946), aff'd, 162 F.2d 513 (10th Cir. 1947); Furnis v. CIR, T.C. Memo. 2001-137, pg. 6; Roberts v. CIR, T.C. Memo. 2012-197, pg. 12).

107. This court's creation of a nearly irrefutable presumption in favor of the government with its current interpretation of §6330(c)(1) reduces the phrases "at the hearing" and "obtain from the Secretary," and "verification" to mere surplusage while ignoring the requirement of strict interpretation of taxing statutes. The court's current interpretation of §6330(c)(1) is incorrect as a matter of law. The case must be remanded and R ordered to comply with the statute by producing a proper "verification by the Secretary that the requirements of all laws and administrative procedures have been met." And if R cannot do so at a new hearing, to order that the determination not be sustained.